85-1895

No. 85-____

Supreme Court, U.S.
FILED
MAY 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

R. ALLEN CHILDRESS,
PETITIONER,

v.

THOMAS S., appt'd guardian
ad litem, JOYCE BROOKS,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ROBERT H. GAGE
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MORGANTON, NORTH CAROLINA 28655
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ATTORNEYS FOR PETITIONER

47pp

Question Presented for Review

Can the state court-appointed guardian of an individual be held responsible as a state actor by virtue of that appointment, under Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982), for alleged state action in failure to accord his ward certain care and treatment, where the guardian has consistently acted independently of state control, is obliged by state law to exercise impartial judgment on his ward's behalf, and has no authority to order any such care and treatment nor any independent resources from which to provide the same?

PARTIES

Parties in the Circuit Court of Appeals were:

Thomas S., by his appointed guardian ad litem, Joyce Brooks; and

Philip J. Kirk, Jr. [previously Sarah T. Morrow], Secretary, North Carolina Department of Human Resources; and

Allen Childress, guardian for plaintiff.

Philip J. Kirk, Jr. has filed a Petition for Writ of Certiorari, Case. No. 85-1590, in this Court.

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District Court:

Opinion and Order-601 F.Supp. 1055

JURISDICTION

The opinion and judgment of the court of appeals was entered on January 9, 1986.

Petitioner Kirk's Petition for Rehearing was denied by Order of February 19, 1986.

The Court has jurisdiction under 28 U.S.C. Section 1254(1) to review the circuit court's judgment.

CONSTITUTIONAL PROVISIONS AND STATUTES:

The Fourteenth Amendment, U.S. Constitution, provides in part:

> Section 1--All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

> States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 USC Section 1983 provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

Citation is made to sections of Chapter 35, Article 1A, North Carolina General Statutes, "Guardianship of Incompetent Adults". Sections 35-1.7 through -1.35 have already been reproduced and filed in this matter at A-1 through A-15 of App. A to Respondent's Brief in Opposition dated April 26, 1986. Sections 35-1.37 and 1.38 are reproduced in App. D. to this petition, infra., at 45.

STATEMENT OF THE CASE

Respondent Thomas S. was born on May 31, 1963 and remained in the custody of the Gaston County, N. C. Department of Social Services until his eighteenth birthday. App. C, Respondent's Brief, 57, 58. On June 4, 1981 that Department filed a petition with the Gaston County Clerk of Superior Court asking that Thomas be declared an incompetent adult. App. C, Respondent's Brief, 37.

On January 28, 1982 an order was signed adjudicating Thomas incompetent. App., infra, 41. Mr. R. J. Blackley, a state employee and a resident of Wake County was appointed guardian for Thomas after the Clerk found "[t]hat there is no individual willing to serve as guardian..." and concluded that "the appointment as guardian of a disinterested public agent as

defined by General Statute 35-1.7(4) is necessary." App., infra, at 45.

On February 22, 1982 your Petitioner Allen Childress was substituted as guardian by the Burke County Clerk of Superior Court because his personal home residence in Burke County was close to that of Tom. App. D, Respondent's Brief, at 280.

Childress is a state employee. His job with the state is that of Regional Specialist for Adult Mental Health, App. D, Respondent's Brief, at 279. There is no contention that it is or ever has been Mr. Childress' responsibility as a state employee to exercise any responsibility to Tom. His only responsibility to Tom is as guardian under his appointment, and he was sued only in his capacity as Thomas' guardian. App. C, Respondent's Brief, at 33-34.

The statutory procedure under which Mr. Childress was appointed is the same as

that applicable to the appointment of any guardian regardless of the guardian's vocation or employment. N.C.G.S. Sections 35-1.6 through 1.38. App. A., Respondent's Brief, A-1 through A-15.

Mr. Childress was appointed as a "disinterested public agent" rather than as an individual or a corporation, N.C.G.S. Sections 35-1.28 and 1.29. App. A, Respondent's Brief, A-12 and -13. There is no distinction of the duties and responsibilities of one sort of guardian from those of any other. See N.C.G.S. Sections 35-1.34 and 1.35. App. A, Respondent's Brief, A-14 and -15.

A "disinterested public official" may by definition have no immediate responsibilities for providing services to his ward. N.C.G.S. Section 35-1.7(4). App. A, Respondent's Brief, at A-3.

No resources are made available to the guardian as guardian for the care, comfort,

and maintenance or for the training, education, employment and rehabilitation or habilitation of Thomas. The only resources which are available to this guardian are those available generally to any guardian, public or private, to a parent, or to anyone else. App. D, Respondent's Brief, at 282-3.

N.C.G.S. Section 35-1.34(b) provides that "a guardian of the person is entitled to be reimbursed out of the ward's estate for expenditures incurred in the performance of his duties." No provision is made for the case in which the ward has no "estate." App. A, Respondent's Brief, at A-15.

The guardian has no authority to order that anyone be treated or cared for at a state institution, at an area program, at a Department of Social Services, or at any other program or institution. App. D., Respondent's Brief, at 282.

The statutory guardianship scheme provides that a guardian shall be accountable to the Clerk of Superior Court, N.C.G.S. Section 35-1.37 and 1.38 or to a "designated agency, if an agency has been appointed", N.C.G.S. Sections 35-1.31(a) and 1.32. App. A, Respondent's Brief, at A-13 and -14. The Clerk of Superior Court is a judicial officer, not a state agent. N.C.G.S. Section 7A-103. There has been no "designated agency" appointed in Thomas' case with the continuing responsibility to receive reports from the guardian. App. D, Respondent's Brief, at 280-81 and 289.

A guardian appointed under Article 1A, Chapter 35, as was petitioner Childress, is charged by statute with the task of exercising his or her ward's rights on behalf of that ward, in a responsible, impartial manner. N.C.G.S. Section 35-1.6, App. A, Respondent's Brief, at A-2.

There is no allegation and no evidence

indicating that the guardian has not discharged his state guardianship duties to his ward Thomas. The Court of Appeals properly found that: "Indeed, throughout the litigation the guardian has tried to secure for Thomas the treatment recommended by the professionals." App., Kirk Petition, at A-21.

Respondent alleged in the district court that jurisdiction is conferred on the federal courts by 28 USC Sections 1331 and 1343 and that the action is authorized by 42 USC Section 1983.

REASONS FOR GRANTING WRIT OF CERTIORARI

The court of appeals relied upon Lugar v. Edmondson Oil Co., 457 US 922 (1982), in finding that the guardian Allen Childress had acted under color of state law in arranging for care and services to be furnished to his ward, Thomas, on the ground that state guardianship law

authorizes or creates the right or privilege of a guardian to make such arrangements. The court held further that Childress "is properly characterized as a state actor because 'he has acted together with or has obtained significant aid from state officials....'" (citing Lugar, 547 US at 937.) App., Kirk Petition, at A-22.

We say that the court was mistaken in applying Lugar to the facts of this matter while wrongly distinquishing:

> Polk County v. Dodson, 454 US 312 (1981), and
> Parham v. J.R., 442 US 584 (1979);

and ignoring:

> Moose Lodge No. 107 v. Irvis, 407 US 163 (1972),
> Flagg Brothers, Inc. v. Brooks, 436 US 149 (1978),
> Rendell-Baker v. Kohn, 457 US 830 (1982), and
> Blum v. Yaretsky, 457 US 991 (1982).

Because the circuit court's decision is in conflict with all seven of the cited decisions (Lugar, Polk County, Parham, Moose Lodge, Flagg Brothers, Rendell-Baker

and Blum), and because the application of the Lugar rationale to the facts of this case broadens ominously the scope of section 1983 jurisdiction, we ask that this court review the decision below by writ of certiorari.

1. Lugar is expressly inapplicable.

This Court's decision in Lugar was based upon a line of cases in which this Court entertained and adjudicated claims of defendant debtors from whom property had been seized upon the instigation of a creditor aided by state agents, and where the debtors asserted that the procedure under which the property was seized was violative of constitutional due process standards. Lugar v. Edmondson Oil Co., Inc., 457 US 922, 933, citing Sniadach v. Family Finance Corp., 395 US 337 (1969); North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 US 601 (1975); and Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974).

In Lugar this Court held only that if defendant debtors could use Section 1983 to challenge their creditors' actions in a property seizure (based on the Sniadach line of cases) then the Lugar plaintiff-debtors could use Section 1983 to challenge the defendant creditor's actions in a similar property attachment case. 457 US at 934.

The Lugar Court had emphasized that even where governmentally-created rights and privileges were present, the actions of the party whose conduct was challenged had to be ascribed to some governmental decision in order to invoke Section 1983. 457 US at 938, citing Moose Lodge No. 107 v. Irvis, 407 US 163, 177 (1972).

Further, action by a private party pursuant to state statute, without something more, was held insufficient to justify a characterization of that party as a "state actor." 457 US at 938-39 and 939

n. 21, citing Flagg Brothers, Inc. v. Brooks, 436 US 149, 157.

The holding in Lugar to the effect that "joint participation" with the State or its agents makes one a "state actor" for Section 1983 purposes was expressly limited to a party's utilization of "a system whereby state officials will attach property on the ex parte application of one party to a private dispute." 457 US 942. The court of appeals erred in using the "joint participation" test to find the guardian Allen Childress to be a state actor for 1983 purposes in the instant situation, so far afield from a debtor-creditor property attachment.

Our circuit court of appeals had held previously that the Lugar holding is "limited to prejudgment attachment situations...", properly refusing to find state action or state "actors" in an eviction proceeding involving an asserted

infringement of First Amendment rights. Deal v. Newport Datsun Ltd., 706 F.2d 141, 142 (1983). The failure of the court of appeals to hold to its own correctly narrow view of Lugar contributes to the confusion created by application of Lugar to the facts of the instant case.

That Lugar was here misapplied is shown more clearly by examination of two cases quoted at length therein, which show that the impetus for the acts complained of must come from the state in order to make a party into a state actor. Jackson v. Metropolitan Edison, 419 US 345 (1974) held that state regulation of a public utility, even coupled with state approval of its rate and service termination tariffs, did not make the utility into a state actor in a case challenging due process deficiencies in termination of service. The utility's "exercise of the choice allowed by state law where the initiative comes from it and

not from the State, does not make its action in doing so 'state action' for purposes of the Fourteenth Amendment." 419 US at 357.

Detailed state regulation of the serving of liquor in a private club which declined to admit Negroes as members or guests was held not to make that club into into a state actor where the state regulation "cannot be said to in any way foster or encourage racial discrimination." Moose Lodge, supra, 407 U.S. at 176-77.

The conclusion is straightforward: there must be a species of cause and effect relationship between the state law or policy and the conduct of the purported state actor. Accord, Adickes v. S. H. Kress and Co., 398 U.S. 144, 170 (1970) ("... a State is responsible for the discriminatory act of a private party when the State, by its law, has compelled the act.")

In the instant case there is no state impetus behind or control over the guardian's actions. The guardian's appointment was not the instance of the declaration of Thomas' incompetency; it was the result of a proceeding initiated by the Gaston County Department of Social Services. See Order Adjudicating the Competency of an Adult, App., infra at 32 and Order Appointing a Guardian for an Incompetent Adult, App., infra at 35. The guardian has no authority to order that his ward be treated or cared for at any institution or program or facility. He has no budget and no staff. The guardian may not be himself involved in providing services to his ward. Respondent's Brief, App. D. at 282-83. His role is to make such decisions as are possible in the circumstances to help Thomas make the best of what third parties may provide. The guardian is not a "state" actor; he acts

for Thomas. See N.C.G.S. Section 35-1.6, Respondent's Brief, App. at A-2.

The state does not control the guardian in the exercise of his guardianship duties, either in law, N.C.G.S. Section 35-1.6(2), or in practice, see Exhibit 2 to Motion of Defendant Morrow for leave to File Separate Brief, filed in this case in the court of appeals on or about December 6, 1984 and reproduced in part, App., infra at 41. The cited exhibit is a letter in which the state's attorney general writes to the state's governor that the attorney general is unaware of any authority whereby the guardian can be required to conform his independent views to those of the state.

We submit that the mere presence of a state statutory scheme regulating guardianship does not make the guardian a state actor any more than liquor regulations or utility tariffs make state actors out of

Moose Lodge No. 107 or Metropolitan Edison Company.

Finally, the concept of "joint participation" suggested by the court of appeals application of Lugar to the instant case would make practically anyone eligible to be a federal defendant. See, e.g., Dahlberg v. Becker, 748 F.2d 85 (2d Cir. 1984) (section 1983 suit unsuccessfully attempted by ex-husband imprisoned under contempt order, against former wife and her attorneys, alleging their joint participation with state officials under New York child support laws); and McDougald v. Jenson, 596 F.Supp. 680 (N.D. Fla., 1984) (ex-husband unsuccessfully sues former wife and judge, alleging their joint participation in obtaining custody decree).

2. Guardianship is a private, not a state function.

This Court declined to find state

action in Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978), where the conduct charged as state action was not traditionally the exclusive function of the state, 436 US at 157-164. The holding in Flagg Brothers was reinforced by this Court's decision in Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982).

That guardianship is not traditionally a public function is shown by the statutory scheme itself, which in fact gives preference to the appointment of private guardians over public ones, N.C.G.S. Sections 35-1.28(d) and 1.29, and by pertinent case law, which characterizes guardianship as a trust relationship. Owens v. Hines, 227 N.C. 236, 41 S.E.2d 739 (1947).

Federal courts have been hesitant to find state action within a traditionally private relationship. Evans v. Abney, 396 U.S. 435 (1970).

Within the guardianship relationship, parents are presumed to act in the best interests of their children, Parham v. J.R., 442 U.S. at 602, and this Court has found that a public guardian, even one with a financial stake in the type and quantity of care provided, was entitled to a similar presumption. 442 U.S. at 618.

3. The guardian owes loyalty to his ward, not to the state.

The Court of Appeals distinguished Polk County v. Dodson, 454 U.S. 312 (1981), by asserting that the factors insulating the public defender of Polk County from state actor status did not apply where the purported state actor was a custodian of the claimant. Reference to the cited passage of the Polk County opinion reveals citations to Estelle v. Gamble, 429 U.S. 97 (1976), and O'Connor v. Donaldson. 422 U.S. 563 (1975). These cases were distinguished by the Court in Polk County

not on the the basis of custody but on the basis of a division of the loyalty of O'Connor and Estelle between their roles as physician and their roles as custodians and administrators. To suggest simply that custody precludes loyalty is in clear conflict with the precepts of Polk County.

The guardian Allen Childress has no such divided loyalty, and none has been suggested or imputed to him. The Polk County public defender's loyalty to her client and independence from "administrative direction" were measured by the A. B. A. Code of Professional Responsibility. 454 U.S. 327-28 (Burger, Ch. J., concurring). The physicians' decisions challenged in Blum were held to "turn on medical judgments made by private parties according to professional standards..." 457 U.S. at 1008. The guardian's actions are taken according to statutory standards which, contrary to

implicating state control, insulate from it. See discussion at 22-23, supra.

Further, the guardian is also accountable to the Clerk of Court, a judicial official, at the instigation of any party to the original incompetency proceeding or "any other interested person." N.C.G.S. Sections 35-1.37 and 1.38, App., infra at 45.

It is thus clear that the guardian does not share the "obligation to the mission that the State...attempts to achieve" through its institutions or programs, which undermined the independent status of the state-employed doctors in O'Connor and Estelle. Polk County v. Dodson, 454 U.S. 312, 320. A correct reading of Polk County lends no support to the court of appeals decision in the instant case.

A contrary result was reached by the Seventh Circuit Court of Appeals in Quilico

v. Kaplan, 749 F.2d 480 (7th Cir. 1984), interpreting Polk County to support a holding that Veteran's Administration physicians may be separated from the control of their government employer by their "primary and unrequivocal duty to exercise his or her independent judgment." Idem at 484-85.

The court of appeals suggests that the provision of state aid to the guardian, for his ward, makes him a state actor. Drawing state actor status from receipt of resources is contrary to the learning of Rendell-Baker v. Kohn, 457 U.S. 830, where the subject school received 90-99% of its budget from state funds but was not thereby a state actor. 457 U.S. at 840-41. Likewise contrary to the court of appeals use of this index of state actor status is Blum v. Yaretsky, 457 U.S. 991 at 1011, where the Court did not view subsidization of the operating and capital costs of the

facilities and payment of the medical expenses of more than 90% of the patients as converting the action of the nursing homes into "state" action.

"The purpose of the state action requirement is to assure that constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains." Blum v. Yaretsky, supra, 457 U.S. at 1004 (emphasis in original). The precedents of this Court "indicate that a State normally can be held responsible only when it has exercised such coercive power or it has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." Idem, citing Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 166; Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357; Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 and

Adickes v. S. H. Kress & Co., 398 U.S. 144, 170. The record in this case makes clear that the guardian is neither responsible to the State for his choices on behalf of his ward, nor coerced by the State in making these choices. The guardian respectfully submits that the contrary conclusion of the court of appeals is in conflict with applicable decisions of this Court and asks that this petition be granted.

This the 15th day of May, 1986.

LAW OFFICES OF COX AND GAGE

BY: Robert H. Gage
Robert H. Gage
Attorneys for Petitioner

APPENDIX

APPENDIX A.

STATE OF NORTH CAROLINA
COUNTY OF GASTON

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE #81 SP 392

IN THE MATTER OF

THOMAS S____,
Respondent.

ORDER ADJUDICATING THE INCOMPETENCY OF AN ADULT

"Gaston County,
Filed Jan 28 1982
at ____ o'clock ___M.
Betty B. Jenkins
Clerk Superior Court"

This matter coming up for hearing pursuant to Article 1A, Chapter 35 of the General Statutes of North Carolina, upon a Petition filed by the Gaston County Department of Social Services on June 4, 1981, requesting that the above-named Respondent be adjudicated incompetent and that a guardian be appointed for him; and being heard by the undersigned Clerk without a jury, who finds by the greater weight of the evidence, the following:

FINDINGS OF FACT

1. That this matter has been continued several times in order to allow completion of the multidisciplinary evaluation requested by the Respondent.

2. That present in Court this date are Petitioner, Gaston County Department of Social Services by and through counsel, Respondent; Respondent's counsel; Mr. James Melton, Director of the Gaston-Lincoln Mental Health Program and witnesses from the Department of Social Services and the Gaston-Lincoln Mental Health Program.

3. That the Court considered as evidence testimony from Danette Rosenberg, Social Worker for the Gaston County Department of Social Services; the Respondent, Thomas S____; a written affidavit from Dr. Suresh Patel, a physician employed by the Gaston-Lincoln Area Mental Health Program; as well as current multidisciplinary evaluations performed on July 30, 1981, and November 9,

1981, by the Division for Disorders of Development and Learning section of North Carolina Memorial Hospital in Chapel Hill, North Carolina.

4. The Court further considered a written report submitted to it by the Respondent's guardian ad liten [sic], the Honorable Edward G. Connette.

Based on the foregoing Findings of Fact, the Court concludes as a Matter of Law:

1. That it has jurisdiction over the subject matter and the parties to this proceeding.

2. That the Respondent is an incompetent adult as defined by General Statute 35-1.7(11).

IT IS, THEREFORE, ORDERED that Thomas S____ be and hereby is, adjudged an incompetent adult. That this matter is continued until 10:00 a.m., January 25, 1982, at which time the Court will consider

evidence as to the appointment of a guardian of the Respondent.

Entered this the 12th day of January, 1982.

Signed this the 28th day of January, 1982.

_____
Betty B. Jenkins
Clerk of Superior Court

(Certificate of Service)

APPENDIX B.

STATE OF NORTH CAROLINA
COUNTY OF GASTON

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE #81 SP 392

IN THE MATTER OF
THOMAS S____,
Respondent.

ORDER APPOINTING A GUARDIAN FOR AN INCOMPETENT ADULT

"Gaston County,
Filed Jan 28 1982
at ____ o'clock ___M.
Betty B. Jenkins
Clerk Superior Court"

It appearing to the undersigned Clerk that the Respondent named above was

adjudicated an incompetent adult by this Court on the 12th day of January, 1982, and the Clerk having considered the Order of Adjudication and the findings therein; and having received testimony by interested persons for the purpose of determining who the guardian for the Respondent shall be, makes the following:

FINDINGS OF FACT

1. That present in Court this date are Petitioner, Gaston County Department of Social Services, by and through its counsel; the Respondent, by and through counsel; and Mr. James Melton, the Director of the Gaston-Lincoln Mental Health Program.

2. That the Petitioner has requested that Mr. James Melton, in his official capacity or some other suitable person pursuant to General Statute 122-24.1, be appointed as guardian for the Respondent.

3. That the Respondent has been in

the legal custody of the Gaston County Department of Social Services since shortly after his birth and that the Respondent is now eighteen (18) years of age.

4. That there is no individual willing to serve as guardian of the Respondent; neither is there any domestic corporation willing to serve as guardian and that exhaustive efforts have been made to find such individuals or corporations willing to serve as guardian for the Respondent.

5. That joint efforts by the Gaston County Department of Social Services and the Gaston-Lincoln Mental Health Program have failed to yield appropriate treatment or placement services suitable to the Respondent's needs and that all area and community-based resources have been exhausted.

6. That Respondent's incompetency and inability to attend to his physical,

social, psychological, medical, and other needs stem from mental problems and that it is this Court's opinion that an agency or professional from the mental health field would be the best choice to serve in the capacity as guardian for the Respondent.

7. That the portion of the multidisciplinary evaluation entitled "Return Client Summary" and performed by the Division for Disorders of Development and Learning in Chapel Hill, North Carolina, recommended that guardianship responsibilities for Respondent could best be fulfilled by a Mental Health professional or agency.

Based on the foregoing Findings of Fact the Court concludes as a Matter of Law:

1. That the appointment as guardian of a disinterested public agent as defined by General Statute 35-1.7(4) is necessary.

2. That pursuant to General Statutes

122-24.1, such a disinterested public agent would include officials and employees of the Department of Human Resources, Division of Mental Health, Mental Retardation, and Substance Abuse Services.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED THAT:

1. R. J. Blackley, Director of the Division of Mental Health, Mental Retardation and Substance Abuse Services, 325 North Salisbury Street, Raleigh, North Carolina 27611, be and the same is hereby appointed guardian of the person of the Respondent with the powers and duties set forth in General Statute 35-1.34 except that Mr. Thomas S____ shall retain the right to secure or consent to whatever legal representation he might feel necessary in order to ensure that said Respondent is receiving appropriate treatment, education, training, employment, rehabilitation or habilitation from his

guardian.

2. That letters of guardianship be issued pursuant to General Statute 35-1.18 and FURTHERMORE that jurisdiction of this matter be transferred to the Clerk of Superior Court, Wake County, solely for the purposes of allowing letters of guardianship to issue.

3. That this Court retains jurisdiction of this matter, with the exception of issuing the letters of guardianship, for such further orders as may be necessary in this proceeding.

Entered this the 25th day of January, 1982.

Signed this the 28th day of January, 1982.

_____
Betty B. Jenkins
Clerk of Superior Court

(Certificate of Service)

APPENDIX C.

State of North Carolina
Department of Justice
P.O. Box 629
Raleigh
27802-0629

Rufus L. Edmisten
Attorney General

March 29, 1983

The Honorable James B. Hunt, Jr.
Governor
State of North Carolina
Capitol Building
Raleigh, North Carolina 27602

Re: Thomas S. vs. Morrow, et al.
(C-C-82-0418-M)

Dear Governor Hunt:

The attached correspondence is forwarded to you in accordance with the provisions of G.S. 147-17(b) which requires such action in any case wherein it is "impracticable" for the Attorney General to represent a State agency, employee, etc. The above referenced case is quite unique and the description of the factual backdrop and current posture of the case is

necessary in order to properly evaluate the problems and legal issues involved.

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....
....

On March 28, 1983, the attorneys on my staff responsible for processing this case met at length with Mr. Childress and other personnel from the Division of Mental Health who are familiar with the case. The purpose of this meeting was to formulate final plans for filing a Motion to Dismiss or in the Alternative for Summary Judgment on behalf of Secretary Morrow and Mr. Childress. The bases for this Motion are that the plaintiff has at all times received appropriate treatment, is still receiving appropriate treatment, and that there is no reason to believe that the State will not live up to its responsibilities in the future under the governing state statutes (including the

controversial continuity of care statute). Mr. Childress, at this meeting, refused to agree to the Motion being filed on his behalf. In taking this position, he claimed that he had not felt that the treatment or placement of the plaintiff at Broughton Hospital was appropriate since at least October, 1982, that he did not feel that the plaintiff's present temporary placement is appropriate and that he has concerns about the development of the proposed permanent placement. He unequivocally stated that he did not want representation by the Attorney General inasmuch as he felt that our primary job was to represent the Secretary of Human Resources and that his responsibilities to this ward were paramount in this ligation.

I do not agree with Mr. Childress' negative assessment of the appropriateness of the treatment/placement of the plaintiff. However, I am not aware of any

authority whereby he can be required, as guardian, to espouse different views, nor of any authority permitting me to file the proposed Motion in his name without his permission.

As a result of the above factors, it is evident that I cannot represent Mr. Childress due to: (1) His divergent views from those of Dr. Morrow, (2) His refusal to permit me to act as his counsel, and (3) Anticipated adverse testimony of Mr. Childress at any hearing or trial before the judge or jury in this case.

....

As a result, it is recommended that the employment of counsel to represent Mr. Childress be authorized under the provisions of G.S. 147-17. Due to the present status of the case, prompt action on this recommendation is requested.

Sincerely,
RUFUS L. EDMISTEN
Attorney General

APPENDIX D.

N.C.G.S. Sections 35-1.37 & -1.38.

§ 35-1.37. Clerk's continuing jurisdiction over guardians.

(a) Upon appointment of a guardian, the clerk shall retain jurisdiction of the matter in order to assure compliance with his orders and those of the superior court. He shall have authority to remove a guardian for cause and he shall appoint a successor guardian after removal, death, or resignation of a guardian. He shall have authority to determine disputes between guardians and to adjust the amount of the guardian's bond.

(b) The clerk shall follow the criteria set forth in G.S. 35-1.28 and 35-1.29 in appointing a successor guardian.

(c) Any party to the original proceeding and any other interested person may petition the clerk to exercise the authority conferred on him by this section. (1977, c. 725, s. 1.)

§ 35-1.38. Clerk's continuing jurisdiction over proceedings.

(a) Any interested person may petition the clerk in the county where the guardian was appointed for modification of his order or for consideration of any matter pertaining to the guardianship.

(b) The clerk may order a multidisciplinary evaluation or other evaluation to be made upon the filing of a petition for subsequent proceedings.

(c) The clerk shall treat all petitions for subsequent proceedings filed under this section as motions in the cause.

(d) The petitioner shall obtain from the clerk a time, date, and place for a hearing on the petition, and shall notify the appropriate persons of the hearing on the petition by mailing a copy of the notice and petition at least 10 days prior to the date of the hearing.

(e) If an emergency exists that threatens the physical well-being of the ward, the clerk may enter ex parte an appropriate order pending disposition of the matter at the hearing. (1977, c. 725, s. 1; 1979, c. 751, s. 26.)

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Supreme Court Bar, and that on the 19th day of May, 1986, I have served a copy of the PETITION FOR WRIT OF CERTIORARI by placing the same in the United States Mail, first class postage prepaid, addressed to the following:

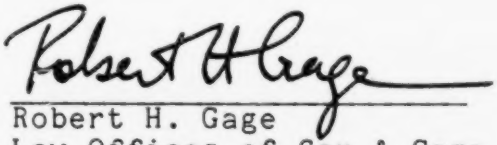
Cathy J. Rosenthal

William O'Connell

and

Wilson Hayman
Assistant Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629

Edward G. Connette, III
Harper & Connette
730 East Trade Street, Suite 200
Charlotte, NC 28202



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